

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: "G" New Delhi

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No: 4810/Del/2010
AY: 2001-02

Shree Shym Khatu Investments Pvt. Ltd., C/o Jai Raj Associates 208, Hans Bhawan, 1BSG Marg, New Delhi-110006 (PAN: AAEC8564J) (Appellant)	vs	ITO, Ward 8(1), New Delhi. (Respondent)
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Appellant by : Dr. Rakesh Gupta, Adv. &
Shri Somil Aggarwal, Adv.
Respondent by : Smt. Anima Banwal, Sr.DR

Date of Hearing : 29.02.2016
Date of pronouncement : 23.05.2016

ORDER

PER SUDHANSHU SRIVASTAVA JUDICIAL MEMBER

Assessee has filed this appeal against the impugned order dated 30.12.2009 passed by the Ld. CIT(A) – XI, New Delhi for assessment year 2001-02.

2. The brief facts of the case are that information was received from the investigation wing of the Income Tax Department that the assessee had received entries of Rs. 5 lacs from M/s Melode Electronics Pvt. Ltd. The reasons recorded for the issuance of notice u/s 148 of the Income Tax Act 1961 and as noted in the order sheet were as under:-

'Information received from the o/o the DIT(Inv) -I, New Delhi revealed that M/s Shree Shyam Khatu Investment P Ltd has introduced unaccounted money in its books of account during FY 00-01 through accommodation entries as per details given below:-

Beneficiary \ name	Beneficiary bank name & branch	Value of entry	Instrument No.	Date	Name of account	Bank & Branch of entry giving a/c	A/c No. of entry.
Shree Shyam Khatu Investment P Ltd	Syndicate Bank, Hauz Khas, N.D.	5,00,000	244593	28/04/00	Melode Electronic P Ltd	Jaya Laxmi Coop. Bank, Fetej Puri, Delhi	2332

In view of the above, I have reason to belief that taxable income to the tune of Rs. 5,00,000/- has escaped assessment within the meaning of sec. 147 of IT Act. 1961. Therefore, it is proposed to issue notice u/s 148 of the IT Act, 1961 in order to tax the above said escaped income....."

3. As per the AO, the assessee did not produce the investor and accordingly, it was the AO's opinion that these entries were bogus and it was assessee's own income from undisclosed sources and an addition of Rs. 5 lacs was made. The assessee questioned the validity of the reassessment proceedings before the Ld. CIT (A) as well as challenged the impugned addition on merits. The Ld. CIT (A) upheld the re-opening of assessment on the basis of reasons recorded. On merits also, the appeal before the Ld. CIT (A) was dismissed on the ground that the assessee had failed to establish the identity and creditworthiness of the investor as well as the genuineness of the transaction. As per the Ld. CIT (A), the appellant had failed to discharge its onus to prove the identity of the investor and as such the other two criteria viz. creditworthiness and genuineness had lost their significance and accordingly the addition made by the Assessing Officer was confirmed by the Ld. CIT(A).

4. In the present appeal before us the grounds of appeal are as under:-

"1. That the order of the Commissioner Appeals is contrary to the law and facts of the appellant's case in so far as it relates to reassessment u/s 147/148 in confirming the addition of Rs. 5,00,000 made u/s 68 by the AO.

2. On the facts and circumstances of the case, the learned CIT (A) has erred by not accepting the contentions of the appellant, depriving the rights of the assessee regarding reopening of the cases u/s 147/148 as held by law of the land.

3. The appellant craves leave for reserving the right to amend, modify, alter, add or forgo any ground(s) of appeal at any time before or during the hearing of this appeal."

5. Ld. Counsel for the assessee drew our attention towards reasons recorded and submitted that the AO has mechanically proceeded to assume jurisdiction u/s 147 of the Act and has issued notice u/s 148 of the Act. Ld. AR contended that the AO simply proceeded on the information of the investigation wing without analysing and applying his mind towards the nature of transactions. He submitted that the so called information said to be received from the investigation wing had not been duly processed by the AO and that there was no material on record to show that the AO had applied his mind in forming a belief which would result in the 'reason to believe' as required to proceed u/s 147 and 148 of the Income Tax Act, 1961. Ld. Counsel vehemently contended that the reasons recorded clearly show that the AO simply proceeded in a mechanical manner and that there was a clear lack of application of independent mind by the AO prior to the issuance of notice u/s 148 of the Act, 1961. Ld. Counsel for the assessee placed his reliance on the following decisions:-

1. G&G Pharma India Limited vs. ITO, Ward 12(1), New Delhi in ITA No. 3149/Del/2013 of ITAT Delhi Bench "C".
2. Rasalika Trading & Investment Co. (P) Ltd. vs ITO, Ward 15(4), New Delhi in I.T.A. No. 3103/Del/2013 of IOTAT Delhi Bench 'F'.

6. Ld. DR, on the other hand, supported the order of the Ld. CIT (A) and stated that the AO had reopened the case on the basis of various documentary evidences relating to the assessee and submitted that the AO has rightly reopened the case of the assessee on the basis of such documentary evidences. Ld. DR also submitted that the decisions relied on by the Ld. AR are on a completely different set of facts and as such were not applicable to the appeal before us.

7. We have heard both the parties and perused the records available with us and after perusing the reasons recorded we find that the reopening is based entirely by making a reference to the information received from the investigation wing. The reasons are at best vague and the satisfaction of the AO is not based on any tangible material. The AO has mechanically issued notices u/s 148 of the Income Tax Act, 1961 on the basis of information received by him from the investigation wing of the Income Tax Department. Therefore, we are of the considered view that the AO has not applied his mind so as to give an independent conclusion that he had reason to believe that income had escaped assessment during the year under consideration. We draw our support from the judgment of the Hon'ble High Court of Delhi in ITA No. 545/2015 dated 8.10.2015 in the case of Pr. Commissioner of Income Tax -4 vs. G&G Pharma India Ltd. in which the Hon'ble Jurisdictional High Court has recapitulated the jurisdictional requirement for reopening of the assessment u/s 147/148 of the Act as under:-

"9. The Court at the outset proposes to recapitulate the jurisdictional requirement for reopening of the assessment under Section 147/148 of the Act by referring to two decisions of the Supreme Court. In Chhugamal Rajpal v. SP Chaliha (1971) 79 ITR 603, the Supreme

Court was dealing with a case where the AO had received certain communications from the Commissioner of Income Tax showing that the alleged creditors of the Assessee were "name-lenders and the transactions are bogus." The AO came to the conclusion that there were reasons to believe that income of the Assessee had escaped assessment. The Supreme Court disagreed and observed that the AO "had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague felling that they may be "bogus transactions". It was further explained by the Supreme Court that:

"Before issuing a notice under S. 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under S. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of cl. (a) or cl. (b) of S. 147 are satisfied, the ITO has no jurisdiction to issue a notice under S. 148."

The Supreme Court concluded that it was not satisfied that the ITO had any material before him which could satisfy the requirements under Section 147 and therefore could not have issued notice under Section 148.

10. In *ACIT v. Dhariya Construction Co.*(2010)328 ITR 515 the Supreme Court in a short order held as under:

"Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the DVO. Opinion of the DVO per se is not information for the purposes of reopening assessment under s. 147 of the IT Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment."

11. *The above basic requirement of Sections 147/148 has been reiterated in numerous decisions of the Supreme Court and this Court. Recently, this Court rendered a decision dated 22nd September 2015 in ITA No. 356 of 2013 (Commissioner of Income Tax II v. Multiplex Trading and Industrial Co. Ltd.) where the assessment was sought to be reopened beyond the period of four*

years. This Court considered the decision of the Supreme Court in Phool Chand Bajrang Lal v. Income-tax Officer (supra) as well as the decision of this Court in M/s Haryana Acrylic Manufacturing Co. (P) Ltd. v. CIT 308 ITR 38 (Del). The Court noted that a material change had been brought about to Section 147 of the Act with effect from 1st April 1989 and observed:

"29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO to have a reason to believe that (a) the income of the Assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the Amendment, only one singular requirement is to be fulfilled under Section 147(a) and that is, that the AO has reason to believe that income of an Assessee has escaped assessment. However, the proviso to Section 147 of the Act provides a complete bar for reopening an assessment, which has been made under Section 143(3) of the Act, after the expiry of four years. However, this proscription is not applicable where the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this Court in M/s Haryana Acrylic Manufacturing Co. (P) Ltd. (supra) explained that the ratio of the decision in Phool Chand Bajrang Lai (supra) may not be entirely applicable since the same was in respect of Section 147(a) as it existed prior to the amendment."

12. In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated : "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the

accounts of the assessee, which must have been tendered along with the return, which was filed on 14th November, 2004 and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the assessee escaped assessment is missing in the present case.

13. Mr. Swaney took the Court through the order of the CIT (A) to show how the CIT (A) discussed the materials produced during the hearing of the appeal. The Court would like to observe that this is in the nature of a postmortem exercise after the event of reopening of the assessment has taken place. While the CIT may have proceeded on the basis that the reopening of the assessment was valid, this does not satisfy the requirement of law that prior to the reopening of the assessment, the AO has to, applying his mind to the materials, conclude that he has reason to believe that income of the assessee has escaped assessment. Unless that basic jurisdictional requirement is satisfied, a post mortem exercise of analysing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity."

8. In the present case also it is seen that the AO has merely relied on the report of the investigation wing but it is apparent that he has not applied his mind to the materials which were before him. In our view, without forming a prima facie opinion on the basis of only the report of the Investigation Wing of the Income Tax Department, it was not legal for the AO to have simply concluded that he has reason to believe that income chargeable to tax has escaped assessment. Unless the basic requirement is satisfied, an exercise in analysing the materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity. In the circumstances and respectfully following the judgment of the Hon'ble High Court of Delhi in the case of Pr. Commissioner of Income Tax-4 vs.

I.T.A. No. 4810/D/2010
Assessment Year 2001-02

G&G Pharma India Ltd. (supra) we hold that the reopening of the case of the assessee for the assessment year is bad in law and we accordingly quash the reassessment proceedings. The other grounds are not being dealt with as the same have become academic in nature.

9. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 23rd May, 2016.

Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 23rd of May 2016
'GS'

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By order

Dy. Registrar